Tang Meng Hock v Tang Ming Seng

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02–894 OF 2006
LOW HOP BING, HELILIAH AND ABDUL MALIK ISHAK JJCA
10 SEPTEMBER 2009

Contract — Consideration — Family arrangement contract — Whether love and affection was good and valid consideration — Contracts Act 1950 s 26(a)

Contract — Construction of terms of contract — Family arrangement contract — Whether contract was void as being both general and ambiguous

The defendant who was the plaintiff's elder brother was appointed as the executor of their late father's will. After the death of their father the plaintiff and defendant entered into a family arrangement that was reduced into a written contract ('the contract') dated 8 June 1998. This contract, which was prepared and witnessed by an advocate and solicitor, was duly stamped and registered and carried the endorsement by the Stamp Office. By way of that contract the defendant as the donor had agreed to give the plaintiff for love and affection cash in the sum of RM60,000, an apartment unit and a piece of land at Mukim Padang Meha ('the land'). In consideration thereof the plaintiff had agreed not to make any further claim against the defendant or against the estate of their deceased father. The defendant had given the plaintiff the cash and the apartment as agreed but then refused to give him the land. The plaintiff then issued a notice dated 17 November 1999 demanding that the defendant transfer the land to the plaintiff. In response the defendant challenged the validity of the contract on the grounds of ambiguity and want of consideration. On 28 July 2000 the defendant went so far as to unilaterally revoke the family arrangements contract. The plaintiff later filed a writ of summons against the defendant for breach of the family arrangements contract. The defendant counterclaimed and sought, inter alia, a declaratory order that the family arrangements were void. The trial judge upheld the validity of the family arrangements contract, gave judgment in favour of the plaintiff and dismissed the defendant's counterclaim. This was the defendant's appeal against that decision. The defendant submitted that the trial judge had erred and that the contract was void as being both general and ambiguous. He further submitted that the contract was void since it was based on love and affection and so without consideration.

Held, dismissing the appeal with costs:

(1) (per **Low Hop Bing JCA** and **Abdul Malik Ishak JCA**) Upon a careful and plain reading of the family arrangements, it was found that the intention of the parties had been expressly set out therein. The words used in the family arrangements drawn up and witnessed by an advocate and solicitor were specific, clear and unambiguous and therefore intended to bear their ordinary meaning. Further, the fact that the defendant had specifically performed two of three items stated in the contract showed that the contract could not be too general and ambiguous. As the words used in the contract were clear and unambiguous, it was the duty of the court to give effect to the bargain of the parties according to their intention in writing by looking at the words used. The parties were bound by what they agreed to and neither party could unilaterally revoke the contract or go against it (see paras 17, 23–24, 37–38).

(2) (per **Low Hop Bing JCA** and **Abdul Malik Ishak JCA**) In Malaysia, moral obligation is considered sufficient consideration under s 26(a) of the Contracts Act 1950 ('the Act'). Under s 26(a) of the Act an agreement without consideration is void unless expressed in writing and registered under the law and also made for 'natural love and affection' by parties 'standing in a near relation to each other'. The plaintiff and defendant in the present case were biological brothers and thus clearly 'standing in a near relation to each other'. The facts of this case also revealed that the family arrangements had been reduced to writing and had been duly stamped and registered with the endorsement by the Stamp Office under ss 47A and 48 of the Stamp Act 1949. As such the family arrangements fulfill all the requirements of s 26(a) of the Act and were valid and enforceable (see paras 18, 20, 22, 52 & 55).

[Bahasa Malaysia summary

Defendan yang merupakan abang sulung plaintif dilantik sebagai wasi kepada wasiat mendiang ayah mereka. Selepas kematian ayah mereka, plaintif dan defendan memeterai persetujuan keluarga yang kemudiannya dijadikan kontrak bertulis ('kontrak') bertarikh 8 Jun 1998. Kontrak ini, yang disediakan dan disaksikan seorang peguam cara dan peguam bela, disetem, didaftarkan dan diendorskan oleh Pejabat Setem. Melalui kontrak tersebut, defendan sebagai penderma telah bersetuju memberikan wang tunai kasih sayang berjumlah RM60,000, satu unit apartmen dan sebidang tanah di Mukim Padang Meha ('tanah'). Sebagai balasan pihak plaintif bersetuju untuk tidak membuat tuntutan lanjut terhadap defendan atau harta pusaka mendiang ayah mereka. Defendan telah memberikan wang tunai tersebut kepada plaintif dan apartmen seperti yang dijanjikan tetapi plaintif enggan

memberikan tanah tersebut kepadanya. Plaintif kemudiannya mengeluarkan notis bertarikh 17 November 1999 meminta defendan memindahkan tanah tersebut kepada plaintif. Sebagai balasan defendan mencabar kesahan kontrak tersebut atas alasan-alasan kekaburan dan ketiadaan balasan. Pada 28 Julai 2000 defendan bertindak secara unilateral membatalkan kontrak persetujuan keluarga tersebut. Plaintif kemudiannya memfailkan writ saman terhadap defendan kerana melanggar kontrak persetujuan keluarga. Defendan menuntut balas dan memohon satu perintah deklarasi bahawa persetujuan keluarga tersebut adalah tak sah. Hakim perbicaraan mengesahkan kontrak persetujuan keluarga tersebut, memberi penghakiman memihak kepada plaintif dan menolak tuntutan balas defendan. Ini merupakan rayuan defendan terhadap keputusan tersebut. Defendan menghujah bahawa hakim perbicaraan khilaf dan bahawa kontrak tersebut tak sah memandangkan ianya bersifat umum dan kabur. Dia kemudiannya menghujah bahawa kontrak tersebut tidak sah memandangkan ia berdasarkan kasih sayang dan tanpa balasan.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR** dan **Abdul Malik Ishak HMR**) Apabila persetujuan keluarga tersebut dibaca secara jelas dan teliti, didapati tujuan pihak-pihak sudah dinyatakan secara tersurat di dalamnya. Perkataan-perkataan yang digunakan dalam persetujuan keluarga tersebut ditulis dan disaksikan oleh seorang peguam cara dan peguam bela adalah khusus, jelas dan tidak kabur dan oleh itu bertujuan menggunakan maksud asal. Selanjutnya, fakta bahawa defendan secara khusus telah melaksanakan dua daripada syarat dalam kontrak tersebut menunjukkan kontrak tersebut bukanlah bersifat terlalu umum dan kabur. Memandangkan perkataan-perkataan yang digunakan di dalam kontrak adalah jelas dan tidak kabur, maka adalah menjadi kewajipan mahkamah untuk membuat keputusan terhadap tawaran pihak-pihak berpandukan tujuan mereka yang tersurat dengan mentafsirkan perkataan yang digunakan. Pihak-pihak adalah terikat dengan apa yang dipersetujui mereka dan mana-mana pihak tidak boleh membatalkan kontrak secara unilateral atau bertindak sebaliknya (lihat perenggan 17, 23–24, 37–38).

(2) (oleh **Low Hop Bing HMR** dan **Abdul Malik Ishak HMR**) Di Malaysia, kewajipan moral merupakan balasan yang mencukupi di bawah s 26(a) Akta Kontrak 1950 ('Akta'). Di bawah s 26(a) Akta, perjanjian tanpa balasan adalah tidak sah melainkan dinyatakan secara bertulis dan didaftarkan mengikut undang-undang dan dibuat untuk 'natural love and affection' oleh pihak-pihak yang 'standing in a near relation to each other'. Plaintif dan defendan dalam kes ini merupakan

adik-beradik kandung dan oleh itu jelas 'standing in a near relation to each other'. Fakta-fakta kes ini juga mendedahkan bahawa persetujuan keluarga tersebut dibuat secara bertulis, disetem dan didaftarkan dengan pengendorsan Pejabat Setem di bawah ss 47A dan 48 Akta Setem 1949. Oleh itu persetujuan keluarga tersebut memenuhi semua keperluan s 26(a) Akta, sah dan boleh dikuat kuasakan (lihat perenggan 18, 20, 22, 52 & 55).]

Notes

For cases on consideration generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3021–3083.

For cases on construction of terms of contract generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3088–3198.

Cases referred to

Antara Elektrik Sdn Bhd v Bell & Order Bhd [2002] 3 MLJ 321, HC (refd)

Bank of Credit and Commerce International SA v Ali & Ors [2002] 1 AC 251, HL (folld)

Central Bank of India v Hartford Fire Insurance Co Ltd AIR [1965] SC 1288, SC (refd)

Chock Yook Kwai @ Chock Yook Sze v Chock Yook Chong & Ors [2001] MLJU 644; [2002] 1 AMR 1256, HC (refd)

Currie & Ors v Misa (1875) LR 10 Exch 153, HL (refd)

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, HL (refd)

Dunton v Dunton (1892) 18 VLR 114, SC (refd)

HSBC Bank plc v Liberty Mutual Insurance Co (UK) Ltd [2001] All ER 61, HC; [2002] EWCA Civ 691, CA (refd)

Investors Compensation Scheme v West Bromwich Building Society Ltd [1998] 1 WLR 896, HL (refd)

JM Wotherspoon & Co Ltd v Henry Agency House [1962] MLJ 86, HC (refd)

Kwan Teck Meng & Ors v Liew Sam Lee [1963] MLJ 333, HC (refd)

Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor [1976] 2 MLJ 177, HC (refd)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, HL (refd)

Melanesian Mission Trust Board v Australian Mutual Provident Society [1997] 1 NZLR 391, PC (refd)

Mulpha Pacific Sdn Bhd v Paramount Corp [2003] 4 MLJ 357, CA (refd)

Mulpha Pacific Sdn Bhd Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd [1990] 2 MLJ 163; [1990] 1 CLJ 995, HC (refd)

National Coal Board v Win Neill & Sonist Helen [1984] 1 All ER 555 (refd)

Pillans v Van Mierop (1765) 3 Burr 1663 (refd)

Prenn v Simmonds [1971] 1 WLR 1381, HL (refd)

Queck Poh Guan (as administrator of the estate of Sit Kim Boo, deceased) v Quick Awang [1998] 3 MLJ 388, HC (refd)

Rann v Hughes (1778) 4 Bro PC 27, HL (refd)
Shadwell v Shadwell (1860) 9 CB(NS) 159 (refd)
Thomas v Thomas (1842) 2 QB 851 (refd)
Ward v Byham [1956] 1 WLR 496, CA (refd)
Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) v Sanko Steamship Co [1976] 1 WLR 989, HL (refd)
White v Bluett (1853) 23 LJR Ex 36 (refd)

Legislation referred to

Contracts Act 1950 s 26(a)
National Land Code Form 14A
Stamp Act 1949 ss 47A(1), 48

AB Ng (AB Ng & Associates) for the appellant.
Lim Boo Chang (Lim Boo Chang & Co) for the respondent.

Low Hop Bing JCA:

APPEAL

[1] On 30 November 2004, after a full trial, the Alor Setar High Court declared the family arrangements made between the respondent ('the plaintiff') and the appellant ('the defendant') on 8 June 1998 as valid and enforceable, and directed the defendant to transfer the land held under Lot 278 HS(D) 294/93, in the mukim of Padang Meha, district of Kulim ('the Meha land') to the plaintiff, and costs.

[2] This is the defendant's appeal against that decision.

FACTS OF THE CASE

[3] The defendant is the plaintiff's elder brother. Their late father, Tang Kai Hoo, died on 29 June 1997, leaving a will dated 17 June 1997 ('the will') under which the defendant was appointed as executor. Save and except the land held under Geran No 5069, Lot 560, in the mukim of Naga Lilit, Padang Serai, district of Kulim ('the Serai land'), their late father's properties had already been given to the children inter vivos.

[4] Under the will, the defendant was to get 15% of the proceeds of sale of the Serai land, while the plaintiff would get RM10,000 there from; and the balance would be distributed at the discretion of the defendant.

[5] After the death of their father, the defendant and the plaintiff entered into a written contract, by way of family arrangements dated 8 June 1998.

The family arrangements, which form the legal basis of the plaintiff's claim and the defendant's counterclaim, merit reproduction in extenso as follows:

FAMILY ARRANGEMENTS

An Agreement made this 8th day of June 1998 between TANG MENG HOCK [NRIC NO 581210-07-5405 (NEW) 5561720 (OLD)] of No 1707, Mukim 12, Kampung Selamat, 13300 Tasek Glugor (hereinafter referred as the 'DONOR') of the one part. And TAN MING SENG [NRIC NO 7440404] of No 1707, Tingkat Selamat 10, Tasek Glugor, Seberang Perai Utara, 13300 Penang (hereinafter referred as the 'DONEE') of the other part.

For the love and affection the Donor shall give to the Donee the following:

(1) Cash RM60,000.00 on or before execution of Agreement herein (the sum of which the Donee hereby acknowledged receipt)

(2) One Unit Apartment Taman Desa Relau 2, Parcel No 10, Storey No 12B, Building No Q (vide Sale Purchase Agreement dated 6th November 1995) purchased in the name of the Donee. The purchase price to be fully paid by the Donor.

(3) All that piece of land known as Lot No 278, HS (D) 294/93 Mukim Padang Meha, Daerah Kulim presently registered in the name of the Donor shall be transferred into the Donee's name.

In Consideration thereof the Donee hereby acknowledged and confirm that the Donee shall make no further claims whatsoever against the Donor and/or the estates of TANG KAI HOO, deceased.

This agreement shall be binding upon the respective heirs personal representatives successors in title and assigns of the Donor and the Donee.

Signed by the Donor TANG MENG HOCK	sgnd..... TANG MENG HOCK
and	.
Donne TANG MING SENG	sgnd..... TANG MING SENG
in the presence of	
sgnd. TAN BAK LEE ADVOCATE & SOLICITOR	Perakuan di bawah Sek. 48 Akta Setem 1949 Disetem di bawah Seksyen 47A(1) Akta Setem sebanyak RM25/- dijelaskan sepenuhnya,
.	t.t. Timbalan Pemugut Duti Setem DaerahTimur Laut, Pulau Pinang LHDN/P 01/2/42/08–148 24/7/99

The family arrangements were apparently prepared and witnessed by an advocate and solicitor and were expressed to be based on love and affection,

pursuant to which the defendant has agreed to give the plaintiff:

(a) cash payment of RM60,000 on or before the execution thereof;

(b) an apartment unit; and

(c) the Meha land.

[6] In consideration thereof, the plaintiff agreed not to make any further claim against the defendant or the estate of their deceased father.

[7] The defendant had fulfilled items (1) and (2) under the family arrangements, by making the cash payment of RM60,000 and giving the apartment unit to the plaintiff, but not the Meha land in item (3).

[8] Some 19 months after the execution of the family arrangements, the plaintiff issued a notice dated 17 November 1999, enclosing Form 14A and related documents, demanding that the defendant transfer the Meha land to the plaintiff. However, the defendant refused to do so.

[9] Vide notice dated 18 December 1999 to the plaintiff's solicitors, the defendant challenged the validity of the family arrangements, on grounds of, inter alia, ambiguity and want of consideration.

[10] On 22 December 1999, the plaintiff's solicitors replied and reiterated the validity of the family arrangements.

[11] On 28 July 2000, the defendant through his solicitors' notice unilaterally revoked the family arrangements.

[12] The plaintiff then filed a writ of summons against the defendant for breach of the family arrangements. The defendant's counterclaim sought, inter alia, a declaratory order that the family arrangements were void.

[13] The learned trial judge upheld the validity of the family arrangements and gave judgment for the plaintiff on 3 November 2004, and dismissed the defendant's counterclaim. Hence, this appeal by the defendant.

FAMILY ARRANGEMENTS

[14] Mr AB Ng, defendant's learned counsel, contended, inter alia, that the family arrangements were void being:

(1) too general and ambiguous;

(2) based on love and affection and so without consideration; and

(3) revoked by the defendant on 28 July 2000. A

[15] The plaintiff's learned counsel Mr Lim Boo Chang took the view that the family arrangements were valid and enforceable, citing s 26(a) of the Contracts Act 1950; *Mulpha Pacific Sdn Bhd v Paramount Corp* [2003] 4 MLJ 357 (CA); and *Antara Elektrik Sdn Bhd v Bell & Order Bhd* [2002] 3 MLJ 321 (HC). B

[16] Upon a careful and plain reading of the family arrangements, we find that the intention of the parties had been expressly set out therein. Without a doubt, they are specific, clear and unambiguous. One may reasonably ask, C how could the family arrangements be too general and ambiguous when the defendant has specifically performed two of the three items stated therein viz items (1) and (2) above? These were the promises the parties have expressly agreed and undertaken to perform. We have no difficulty in dismissing the defendant's submission which sought to invalidate the family arrangements D on the ground that they were too general and ambiguous.

[17] In relation to the next argument presented for the defendant that the family arrangements based on love and affection were void, being without consideration, we are of the view that the elementary short answer is to be E found in s 26(a) of the Contracts Act 1950 which reads as follows:

> 26 Agreement made without consideration, void, unless —
> An agreement made without consideration is void, unless —
>
> (a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other; F

G

[18] The question whether there is in fact any natural love and affection may be determined by reference to the evidence adduced and the surrounding circumstances: *Kwan Teck Meng & Ors v Liew Sam Lee* [1963] MLJ 333; *Queck Poh Guan (as administrator of the estate of Sit Kim Boo, deceased) v Quick Awang* [1998] 3 MLJ 388; and *Chock Yook Kwai @ Chock Yook Sze v* H *Chock Yook Chong & Ors* [2001] MLJU 644; [2002] 1 AMR 1256 (HC).

[19] It is an established principle that natural love and affection is good and valid consideration in law. This is all too well-known in land conveyancing law and practice. I

[20] I have had the opportunity of considering the meaning of this expression in *Chock Yook Kwai*, at pp 1278 and 1279 (AMR). The relevant portions are:

The expression 'natural love and affection' has not been defined in s 26(a), and so the ordinary popular dictionary meaning applies.

In ordinary parlance, 'natural' in the context of 'natural love and affection' in my view means inborn; spontaneous; happening in the usual course; *related by actual birth* (not adoption).

The word 'love' is denoted by fondness; and affection of the mind caused by that which delights; strong liking.

The word 'affection' denotes an act of influencing; emotion; disposition; love or attachment (see *Chambers Twentieth Century Dictionary*).

There is in my view a special position, meaning and dimension attributed to the expression 'natural love and affection', both in fact and in law.

In my considered opinion, in the case of the natural parents and their children, a presumption of natural love and affection arises so that a valid consideration is constituted in law for the purposes of s 26(a).

For s 26(a) to apply, two requirements must be fulfilled, viz the agreement is in writing and registered; and there must be natural love and affection between parties standing in near relation to each other.

[21] The facts in the mainstream of the instant appeal reveal that the family arrangements had been reduced to writing and it has been duly stamped and registered as 'LHDN/P 01/2/42/08-148 24/7/99', with the endorsement by the Stamp Office under ss 47A(1) and 48 of the Stamp Act 1949. A stamp duty of RM25 has been levied there on. It has been expressed to be for love and affection. The parties are biological brothers. They are certainly in near relation to each other, *being related by actual birth*. There is no substance in the defendant's submission. Hence, we have no hesitation in finding that the requirements of s 26(a) have been fulfilled, and hold that the family arrangements are valid and enforceable.

[22] That being the case, it is the duty of the court to give effect to the bargain of the parties according to their intention in writing by looking at the words used, unless they are such that one may suspect that they do not convey the intention correctly. As the words used therein are clear and unambiguous, there is very little that the court has to do. The court will invariably give effect to the plain meaning thereof: *Mulpha Pacific Sdn Bhd Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995 (HC); *National Coal Board v Win Neill & Sonist Helen* [1984] 1 All ER 555; and *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288.

[23] Since the contract has set out the family arrangements in clear and unambiguous words, the parties are bound by what they had agreed to, and neither party could unilaterally revoke or go against it: see eg *Antara Elektrik*

Sdn Bhd at p 324A per Azmel J (later FCJ).

CONCLUSION

[24] For reasons given above, we hold that the learned trial judge's decision is free from any error; and we affirm it. The defendant's appeal is hereby dismissed with costs of RM3000 to the plaintiff. Deposit to the plaintiff on account of the costs.

[25] My learned brother Hj Abdul Malik bin Hj Ishak JCA has also written a separate judgment in support of this judgment.

Abdul Malik Ishak JCA:

[26] This appeal concerns a squabble between two biological brothers arising from the family arrangements dated 8 June 1998 entered between them. That family arrangements formed the plank of the plaintiff respondent's claim and the defendant appellant's counterclaim.

[27] By way of that family arrangements, the defendant appellant as the donor has agreed to give to the plaintiff respondent as the donee for love and affection:

(a) cash in the sum of RM60,000;

(b) one unit apartment located at Taman Desa Relau 2; and

(c) a piece of land at Mukim Padang Meha.

[28] And by way of a consideration, the plaintiff respondent agreed not to make any further claim against the defendant appellant or against the estate of their deceased father.

[29] The defendant appellant had complied with categories (a) and (b) of the family arrangements but refused to fulfil category (c) thereto.

[30] Through their solicitors, the brothers were at loggerheads as to the validity of the family arrangements. The defendant appellant argued that the family arrangements were ambiguous and lacked consideration. While the plaintiff respondent said otherwise and argued that the family arrangements were valid.

[31] The altercation got worse when on 28 July 2000, the defendant appellant gave notice through his solicitors and unilaterally revoked the

family arrangements. This prompted the plaintiff respondent to file a writ of summons against the defendant appellant for breach of the family arrangements. The defendant appellant responded and through his counterclaim sought, inter alia, for a declaration that the family arrangements between them were void.

[32] The High Court heard the case and, consequently, gave judgment in favour of the plaintiff respondent by upholding the validity of the family arrangements. The High Court also dismissed the defendant appellant's counterclaim. Aggrieved by the decision of the High Court, the defendant appellant now appeals to this court.

[33] I am fortunate that my learned brother Low Hop Bing JCA has meticulously set out the facts of the case in his judgment and I gratefully adopt them. Suffice for me to say that the dispute between the two brothers centred on the family arrangements.

[34] I must emphasise that the family arrangements were prepared and witnessed by an advocate and solicitor and it had been reduced in written form, duly stamped and registered and carried the endorsement by the Stamp Office under ss 47A(1) and 48 of the Stamp Act 1949 (Act 378). With these basic background in mind, I must now proceed to interpret the family arrangements between the two biological brothers. But first, I must state the basic principles of interpretation:

(a) that in interpreting a document one must consider what the document would convey to a reasonable person who has all the background knowledge surrounding the document and the background knowledge would include absolutely anything;

(b) that the meaning which a document may convey to a reasonable person is not the same and is different from the meaning to be gathered from the words of the document itself; it is said that the meaning of the words may be deduced by referring to dictionaries and grammars; it is also said that the meaning of the document must be viewed against the relevant background which the parties using the document would have reasonably understood it to mean (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749); and

(c) that the words in the document should be given their 'natural and ordinary meaning' and such an approach is described as a common sense approach bearing in mind that people do not make linguistic mistakes when preparing formal documents just like the family arrangements at hand.

[35] It would certainly be ideal to read the judgments of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 at pp 1384–1386 and in *Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) v Sanko Steamship Co* [1976] 1 WLR 989. In the former case, the rationale of excluding negotiations was that no consensus had then been reached between the parties whereas in the latter case it was said that the court should place itself in the same factual context as that in which the parties were when they made their agreement. It was because of the speeches of Lord Wilberforce in these two cases that prompted Lord Hoffmann to set out the principles of interpretation in the case of *Investors Compensation Scheme v West Bromwich Building Society Ltd* [1998] 1 WLR 896 as demonstrated in this judgment.

[36] It is important to read the family arrangements as reproduced verbatim by His Lordship Low Hop Bing JCA in his judgment as a whole and not on a piecemeal basis. It is a good starting point to assume and I must assume that the words used in the family arrangements drawn up and witnessed by an advocate and solicitor were intended to bear their ordinary meaning. And I too cannot jump to the conclusion that a mistake has been made by the advocate and solicitor in drafting the family arrangements. There was nothing amiss. For if there were, the defendant appellant would not have complied with categories (a) and (b) of the family arrangements. I am not prepared to rewrite the family arrangements (see *HSBC Bank plc v Liberty Mutual Insurance Co (UK) Ltd* [2001] All ER 61 which was affirmed on appeal vide [2002] EWCA Civ 691).

[37] I have perused through the family arrangements with a fine toothcomb and I must say that the words used are clear and unambiguous (*Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391). There is no ambiguity to be detected because there is none. And of importance is this, that there is no double or multiple meaning to the family arrangements at all. It is as simple as that. And so, I hold that it is wrong to say as was said by learned counsel for the defendant appellant that the family arrangements were void as being too general and ambiguous. They are not. On the contrary, they are valid and binding. And they are not ambiguous.

[38] An argument was also advanced to the effect that the family arrangements were void since it was based on love and affection and therefore there was no consideration. The traditional definition of consideration tends to revolve on the ideas of benefit and detriment. Thus, Lush J, in *Currie & Ors v Misa* (1875) LR 10 Exch 153 at p 162 defined consideration in this way:

A

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

B

[39] Sir Frederick Pollock in his book on *Contracts* (8th Ed) at p 175 defined consideration as:

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

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[40] And Sir Frederick Pollock's definition received the approval of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at p 855. This sort of definition makes reference to the price requested by the promisor in exchange for which the promisor's promise was bought.

D

[41] All the case laws are concerned with identifying what can constitute consideration and whether it is possible to enforce a promise in the absence of consideration.

E

[42] Speaking historically, when Lord Mansfield became the Chief Justice of the King's Bench in 1756 he refused to recognise consideration as a vital criterion to a contract and he treated consideration as mere evidence of the parties' intention to be bound and he relied heavily on the presence of writing in order to show intention (see *Pillans v Van Mierop* (1765) 3 Burr 1663). Lord Mansfield held that a moral obligation could amount to consideration. To say the least, this view effectively destroyed the doctrine of consideration. According to Lord Mansfield, making a promise implies a moral obligation to keep it and so every promise would be supported by consideration. And we all know that Lord Mansfield approach was repelled subsequently (see *Rann v Hughes* (1778) 4 Bro PC 27).

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[43] In order to prevent an unjust avoidance of an agreement, the courts would proceed to give an artificial interpretation to the principles of consideration. This was done in the case of *Ward v Byham* [1956] 1 WLR 496 as well as in the case of *Shadwell v Shadwell* (1860) 9 CBNS 159 where there were sound reasons of policy and justice for enforcing the doctrines and where the doctrine of consideration had to be considerably stretched in order to give effect to the agreements.

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[44] The case of *Ward v Byham* illustrates the willingness of the courts to find evidence of some consideration where public policy reasons seem to demand that a promise be binding. The facts of that case may be stated as follows. Ms Ward and Mr Byham lived together from 1949 to 1954, and in

1950 they had a daughter. In 1954, Mr Byham threw Ms Ward out of the house, but kept their daughter with him. Some months later, Ms Ward asked to take the child to live with her, and Mr Byham wrote to say that she could do so, and that he would pay £1 a week maintenance provided that she could 'prove that the daughter will be well looked after and happy', and that the little girl was allowed to decide for herself whether or not she wanted to go and live with her mother. Ms Ward duly took their daughter. Mr Byham paid the maintenance as agreed for seven months but stopped when Ms Ward married another man. She sued for the money. Mr Byham alleged that there was no consideration because as the mother of an illegitimate child, she was already under a statutory duty to maintain the little girl and so her promise to do so was not consideration. On the facts, the majority of the court held that there was a valid contract because her promise to see that their daughter was happy and to allow their daughter to choose which parent their daughter wanted to live with, went beyond her statutory duty, and could therefore be consideration for Mr Byham's promise to pay maintenance.

[45] I will now narrate briefly the facts of *Shadwell v Shadwell*. The plaintiff in that case was a young barrister and was engaged to be married. His uncle wrote and offered to give him £150 a year, until such time as the plaintiff was earning 600 guineas a year from his practice at the Bar. The plaintiff duly got married. The plaintiff never reached the point where he was earning 600 guineas a year but the allowance promised by his uncle was not always paid. When the uncle died, the plaintiff brought an action to recover the arrears from his uncle's personal representatives. They argued that there was no consideration for the promise and that all the plaintiff had done was to marry his fiancee which he was bound to do before the uncle wrote his letter (at that time a promise to marry was considered legally binding and could be sued upon if broken). The majority of the court held that when the plaintiff married his fiancee that would constitute consideration. It was a detriment to the plaintiff because it involved incurring financial responsibilities which could have been problematic without the uncle's allowance. The court also accepted that the marriage provided some benefit to the plaintiff. The court held that there was also some benefit to the uncle in that he would be pleased about the marriage of such a near and close relative.

[46] Consideration and motive are quite different from one another. With consideration, the promisor gets something in return for the promise. But it is not the same with motive. The difference between motive and consideration can be seen in the case of *Thomas v Thomas* (1842) 2 QB 851 and the brief facts may be stated as follows. When Mr Thomas died, the matrimonial home was in his name. He had verbally expressed a desire that his wife be permitted to continue living in the house after his death and his executors, relying on that desire, agreed to her continued possession. Their

permission was stated to be in consideration of the husband's expressed wish, but they attempted to protect themselves by requiring that the wife undertake to keep the house in good repair and that she pay a nominal ground rent of £1pa. The executors subsequently refused to sign the necessary deed and the wife sued. She succeeded. Even though the executor's motive to carry out her husband's last wishes could not be consideration, her promise to pay £1pa in rent could be and that was enough to make the agreement enforceable. That promise was valuable, it was sufficient to make the agreement binding. Patteson J, at p 333 of the report aptly said:

> Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: ... a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; ...

[47] Two more examples to show the distinction between motive and consideration must be highlighted. They formed the old cases. *White v Bluett* (1853) 23 LJR Ex 36 is one of them. The other is *Dunton v Dunton* (1892) 18 VLR 114.

[48] The facts in *White v Bluett* are as follows. There the defendant had borrowed money from his father and had secured the debt with a promissory note. When his father died the debt was still outstanding and the executors sued. In his defence the son alleged that, in consideration of his promise to stop complaining that his brothers had received preferential treatment, his father had promised to forgive him about the debt and to discharge him from further liability. The court held that the son had no legal right to complain in the first place. That is, in not complaining, he had suffered no legal detriment. The agreement therefore was wholly attributable to the father's desire not to suffer further annoyance and that would be his motive and so it was unenforceable.

[49] The facts in *Dunton v Dunton* are as follows. Mr Dunton agreed to pay his divorced wife a monthly sum provided that she 'conduct herself with sobriety, and in a respectable, orderly and virtuous manner'. The divorced wife sued him to recover the promised amount when the husband reneged. She succeeded. The court held that whilst Mr Dunton's motive in offering the money, his desire that she conduct herself in such a way as not to bring discredit upon their five young children could not be good consideration whereas the divorced wife's promised forbearance was held to be good consideration. The court held that the divorced wife had a perfect legal right to act in a disorderly manner, to drink and to behave as she pleased within

the limitations of public decency. And when she gave up these rights, it constituted a detriment and thus was sufficient consideration to support the promise.

[50] Thus, it can be seen that forbearance (deliberately omitting to do some act or to exercise some right, usually upon the request of another) can constitute good consideration. In *Dunton v Dunton*, for instance, the consideration alleged need not be an act or a thing. It may simply be a promise not to do something which the promisee was entitled to do. Such failure to exercise a present existing right, at the request of the promisor, will constitute good and sufficient consideration.

[51] Back home in Malaysia, the question of moral obligation is neatly housed in s 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974) which reads as follows:

> 26 Agreement made without consideration, void, unless —
>
> An agreement made without consideration is void, unless —
>
> (a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;

[52] In *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177 at p 181, Hashim Yeop Sani J (as he then was) said that 'An agreement without consideration is void unless it comes under one of the exceptions in s 26 of our Contracts Act 1950'. Again, in *JM Wotherspoon & Co Ltd v Henry Agency House* [1962] MLJ 86 at p 87, Suffian J (as he then was) aptly said that 'An agreement made without consideration becomes a contract if, but only if, in the words of s 26(b) of the Contracts (Malay States) Ordinance No 14 of 1950: 'It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor.'

[53] With the benefit of hindsight, it seems to me that s 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974) follow closely the suggestions of Lord Mansfield which require both written and moral obligation to be the prerequisites for consideration.

[54] Section 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974) states that an agreement made without consideration is void. So every agreement must have some form of consideration. And that such an agreement that is made has to be 'made on account of natural love and affection between parties standing in a near relation to each other'.

Furthermore, there is also a requirement that the agreement be 'expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents'. The phrase 'natural love and affection' cannot be read in isolation. It must be linked to the requirement that the parties must be 'standing in a near relation to each other'. Here, both the parties are biological brothers and they are clearly 'standing in a near relation to each other'. The facts as alluded to in the early part of this judgment would show that the family arrangements fulfilled all the requirements of s 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974). For all these reasons, I would agree with my learned brother Low Hop Bing JCA that the family arrangements have all the trappings of legality and they must be held to be valid and enforceable.

[55] It has always been the case that when interpreting a document like the family arrangements in question, the advice of Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251 at p 269 must be heeded and that would be that the 'primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage'. And according to Lord Bingham of Cornhill in the same case at p 259, the court 'reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties'. I have done just that in interpreting the family arrangements.

[56] What is left for me now is to make those orders as made by my learned brother Low Hop Bing JCA and I do so accordingly.

Appeal dismissed with costs.

Reported by Kohila Nesan